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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 Mary S. Garrow,

9 Plaintiff,

10 vs.

11 Tucson Clips, LLC, doing business as  
12 Great Clips,

13 Defendant.

) No. CV 22-00243-TUC-RM (LAB)

) REPORT AND RECOMMENDATION

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15 Pending before the court is a motion for sanctions, filed by the defendant, Tucson  
16 Clips (“Clips”), on September 8, 2022. (Doc. 9) The plaintiff, Mary Garrow, filed a  
17 response on October 31, 2022. (Doc. 16) Clips filed a reply on November 10, 2022. (Doc.  
18 19)

19 The case has been referred to the Magistrate Judge for report and recommendation in  
20 accordance with 28 U.S.C. § 636(b)(1) and LRCiv. 72.1 and 72.2. (Doc. 7)

21 The plaintiff, Garrow, maintains that she suffered discrimination while working as a  
22 hair stylist at Great Clips. (Doc. 1) On May 23, 2022, Garrow filed in this court a  
23 Complaint, which is separated into four claims: (1) Discrimination: Race/Age; (2)  
24 Retaliation; (3) Preferential Treatment, Under Title VII; and (4) Intentional Infliction of  
25 Emotional Distress (IIED). (Doc. 1, pp. 2-3) Service was accomplished on August 19, 2022.  
26 (Doc. 11)  
27  
28

1 On September 8, 2022, Clips filed a motion to dismiss pursuant to Fed.R.Civ.P.  
2 12(b)(6). (Doc. 8) That same day, it filed the pending motion for sanctions. (Doc. 9) Clips  
3 maintains that the Complaint was filed in bad faith because Garrow and Clips entered into  
4 a Settlement Agreement in December of 2021 that precludes all of Garrow's claims. *Id.*  
5 Clips argues that sanctions should be awarded pursuant to Fed.R.Civ.P. 11(c), 28 U.S.C. §  
6 1927, and A.R.S. § 12-349. *Id.* It moves in the alternative for attorneys' fees and costs  
7 pursuant to the Settlement Agreement itself. *Id.*

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9 Discussion

10 Garrow maintains that she suffered discrimination while working as a hair stylist at  
11 Great Clips. (Doc. 1) Garrow filed a Charge of Discrimination with the Arizona Attorney  
12 General's Office on January 14, 2021. (Doc 8-3, p. 2) On February 10, 2021, Garrow filed  
13 a report with the Marana Police Department charging the General Manager Acevedo and  
14 others with false imprisonment. (Doc. 1, p. 3); *see* (Doc. 8-2) Shortly afterwards, Garrow  
15 was terminated from her position. (Doc. 1, p. 3)

16 "In November of 2021, upon being advised by governmental agencies that they were  
17 unable to establish probable cause of unlawful discrimination, [Garrow] approached [Clips]  
18 seeking to resolve the dispute without either Party admitting liability." (Doc. 8-3, p. 2) On  
19 December 20, 2021, the parties entered into a Confidential Settlement Agreement and  
20 Release ("Settlement Agreement") in which Garrow released Clips of any liability for  
21 anything that happened prior to that date in exchange for \$6,000.00. (Doc. 8, p. 11); (Doc.  
22 8-3); (Doc. 9, p. 3) She explicitly waived any claims under the ADE, ADEA and Title VII  
23 "as well as under any other statute or common law principles of similar effect." (Doc. 8, p.  
24 4.); (Doc. 9, p. 3)

25 Nevertheless, "after Plaintiff deposited the settlement check, she proceeded to file [on  
26 January 7, 2022] a breach of contract action in Pima County Justice Court against Tucson  
27 Clips asking that court to 'strike the unconscionable part of the contract or agreement  
28 settlement unilateral' and demanding \$8,000.00 in relief." (Doc. 8, p. 10); (Doc. 8-4, p. 3);

1 (Doc. 9, pp. 3-4) Garrow asserted that Clips intentionally delayed payment of the check,  
 2 breached the “unilateral (one sided)” contract, and committed “non [-] communication, bad  
 3 faith, non [-] performance, [and] deceitful misrepresentation.” (Doc. 8-4, p. 4) She further  
 4 alleged that her copy of the Settlement Agreement omitted pages seven and eight and she  
 5 never received a copy of the parties’ signatures. *Id.*

6 Apparently, delivery of the settlement check, which was cut on December 30, 2021,  
 7 was delayed due to the holiday season. (Doc. 18-1, p. 12) It was eventually delivered on  
 8 January 5, 2022 “within the time period stated in the Settlement Agreement.” (Doc. 18-1,  
 9 p. 12) Garrow “refused” to give Clips her email address, so a hard copy of the Settlement  
 10 Agreement had to be sent by mail. *Id.* The hard copy, however, was inadvertently omitted  
 11 from the envelope that contained the check. *Id.* Clips provided Garrow with a complete  
 12 copy of the Settlement Agreement when Garrow filed her complaint in Justice Court and  
 13 Clips learned of the oversight. *Id.*

14 On July 29, 2022, the Justice Court granted Clips’s motion to dismiss the action with  
 15 prejudice and awarded sanctions in the amount of \$5,000 against Garrow for bringing the  
 16 lawsuit in violation of the Settlement Agreement. (Doc. 8, p. 10); (Doc. 8-5); (Doc. 9, pp.  
 17 1, 4)

18 Previously, on May 23, 2022, Garrow filed a Complaint in this court alleging  
 19 discrimination. (Doc. 1) Clips’s counsel cautioned Garrow that if she insisted on pursuing  
 20 this action in federal court after her loss in Justice Court, “a similar result would be likely.”  
 21 (Doc. 9, p. 4) Nevertheless, on August 19, 2022, Garrow served the pending Complaint on  
 22 Clips. *Id.*; (Doc. 11) On September 8, 2022, Clips filed a motion to dismiss and the pending  
 23 motion for sanctions. (Doc. 8); (Doc. 9)

24 Clips argues first that sanctions should be awarded pursuant to Fed.R.Civ.P. 11. (Doc.  
 25 9) Rule 11(b) explains that:

26 By presenting to the court a pleading, written motion, or other paper--whether  
 27 by signing, filing, submitting, or later advocating it--an attorney or  
 28 unrepresented party certifies that to the best of the person’s knowledge,  
 information, and belief, formed after an inquiry reasonable under the  
 circumstances:

1 (1) it is not being presented for any improper purpose, such as to harass, cause  
unnecessary delay, or needlessly increase the cost of litigation;

2 (2) the claims, defenses, and other legal contentions are warranted by existing  
3 law or by a nonfrivolous argument for extending, modifying, or reversing  
existing law or for establishing new law . . . .

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5 Fed. R. Civ. P. 11(b). “If, after notice and a reasonable opportunity to respond, the court  
6 determines that Rule 11(b) has been violated, the court may impose an appropriate sanction  
7 on any attorney, law firm, or party that violated the rule or is responsible for the violation.”

8 Fed. R. Civ. P. 11(c).

9 Clips argues that sanctions are appropriate here because Garrow filed a frivolous  
10 Complaint. (Doc. 9, pp. 3-4) It reasons that the Complaint is frivolous because the  
11 Settlement Agreement precludes all of her claims and Garrow knew this was true because  
12 the Pima County Justice Court ruled that the Settlement Agreement was valid and  
13 enforceable. *Id.*

14 Rule 11 sanctions, however, are only available by motion<sup>1</sup> if the offending party is  
15 warned that such a motion is in the offing and refuses to withdraw the objectionable filing.  
16 Fed.R.Civ.P. The motion for sanctions must be served on the offending party first.  
17 Fed.R.Civ.P. 11(c)(2). It may only be filed in the District Court if the objectionable filing  
18 is not withdrawn or corrected within 21 days after service of the motion. *Id.*

19 In this case, the motion for sanctions was served on Garrow on the same day that it  
20 was filed in this court, September 8, 2022. (Doc. 9, p. 7) Garrow was not give the 21-day  
21 “safe harbor” provision required by Rule 11(c)(2). Fed.R.Civ.P. Clips’s motion for  
22 sanctions pursuant to Rule 11 should be denied. *See, e.g., Retail Flooring Dealers of Am.,*  
23 *Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1150 (9<sup>th</sup> Cir. 2003) (“[T]he purpose of the safe  
24 harbor is to give the offending party the opportunity, within 21 days after service of the

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26 <sup>1</sup> This court expresses no opinion as to whether the District Court could or should impose  
27 sanctions *sua sponte* pursuant to Rule 11(c)(1). *See Matsumaru v. Sato*, 521 F. Supp. 2d 1013, 1016  
28 (D. Ariz. 2007) (“The Court may impose sanctions on its own initiative after the complaint is  
dismissed . . . when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”)  
(punctuation modified).

1 motion for sanctions, to withdraw the offending pleading *and thereby escape sanctions.*")  
 2 (emphasis in original).

3 Clips explains that it did try to warn Garrow informally that if she pursued her action  
 4 in federal court after losing in Justice Court, "a similar result would be likely." (Doc. 9, p.  
 5 4) This, however, is not enough. *Barber v. Miller*, 146 F.3d 707, 710 (9<sup>th</sup> Cir. 1998) ("It  
 6 would . . . wrench both the language and purpose of the amendment to the Rule to permit an  
 7 informal warning to substitute for service of a motion."). The defendant's motion for  
 8 sanctions pursuant to Rule 11 should be denied.

9 Clips further argues that sanctions are appropriate pursuant to 28 U.S.C. § 1927.  
 10 (Doc. 9, p. 4) The statute provides as follows:

11 Any attorney or other person admitted to conduct cases in any court of the  
 12 United States or any Territory thereof who so multiplies the proceedings in any  
 13 case unreasonably and vexatiously may be required by the court to satisfy  
 personally the excess costs, expenses, and attorneys' fees reasonably incurred  
 because of such conduct.

14 28 U.S.C.A. § 1927.

15 "Because the section authorizes sanctions only for the multiplication of proceedings,  
 16 it applies only to unnecessary filings and tactics once a lawsuit has begun." *In re Keegan*  
 17 *Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9<sup>th</sup> Cir. 1996) (punctuation modified).  
 18 Accordingly, "§ 1927 cannot be applied to an initial pleading" such as a complaint *Id.*  
 19 Sanctions are not available here pursuant to 28 U.S.C. § 1927.

20 Clips further argues that sanctions should be awarded pursuant to A.R.S. § 12-349.  
 21 (Doc. 9, p. 5) The statute reads in pertinent part as follows:

22 Except as otherwise provided by and not inconsistent with another statute, in  
 23 any civil action commenced or appealed in a court of record in this state, the  
 24 court shall assess reasonable attorney fees, expenses and, at the court's  
 discretion, double damages of not to exceed five thousand dollars against an  
 attorney or party, including this state and political subdivisions of this state, if  
 the attorney or party does any of the following:

- 25 1. Brings or defends a claim without substantial justification.
- 26 2. Brings or defends a claim solely or primarily for delay or harassment.
- 27 3. Unreasonably expands or delays the proceeding. . . .

1 A.R.S. § 12-349(A).

2 Section 12-349, however, is a state procedural statute that applies only to state  
3 proceedings. It does not apply to actions filed in federal court. *In re Larry's Apartment,*  
4 *L.L.C.*, 249 F.3d 832, 838 (9<sup>th</sup> Cir. 2001) (“In other words, the federal courts must be in  
5 control of their own proceedings and of the parties before them, and it is almost apodictic  
6 that federal sanction law is the body of law to be considered in that regard.”); *Pacesetter*  
7 *Consulting LLC v. Kapreilian*, No. CV-19-00388-PHX-DWL, 2021 WL 4820485, at \*4 (D.  
8 Ariz. Oct. 15, 2021) (“[T]he Ninth Circuit has held that § 12-349 cannot serve as the basis  
9 for an award of sanctions by a federal court for litigation conduct occurring in federal  
10 court.”). Sanctions are not available here pursuant to A.R.S. § 12-349.

11 Finally, Clips argues that this court should award attorneys’ fees and costs pursuant  
12 to the Settlement Agreement itself. That document provides that “the prevailing party in any  
13 action, suit or legal proceeding brought to enforce the Agreement’s terms . . . shall be entitled  
14 to recover attorneys’ fees and costs incurred in such action or suit.” (Doc. 9, p. 6) Clips has  
15 not, however, provided the court with sufficient information to properly evaluate its  
16 attorneys’ fees and costs, assuming it is the prevailing party in this action. This part of the  
17 motion should be denied without prejudice. Clips may file an appropriate motion pursuant  
18 to LRCiv 54.1 and 54.2 after entry of judgment.

#### 19 20 RECOMMENDATION

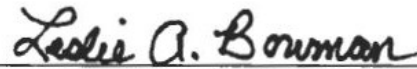
21 The Magistrate Judge recommends that the District Court, after its independent review  
22 of the record, enter an order

23 Denying the motion for sanctions, filed by the defendant, Tucson Clips (“Clips”), on  
24 September 8, 2022. (Doc. 9) Clips may file a motion for attorneys’ fees and costs pursuant  
25 to LRCiv 54.1 and 54.2 after entry of judgment assuming it is the prevailing party.

26 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within  
27 14 days of being served with a copy of this report and recommendation. If objections are  
28 not timely filed, the party’s right to de novo review may be waived. The Local Rules permit

1 the filing of a response to an objection. They do not permit the filing of a reply to a response  
2 without the permission of the District Court.

3 DATED this 9<sup>th</sup> day of January, 2023.  
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7 Leslie A. Bowman  
8 United States Magistrate Judge  
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